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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/057,089	01/25/2002	Frank G. Liedl JR.	F1103/1(V)	3328

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EXAMINER	
PRATT, HELEN F	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 05/06/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/057,089	LIEDI ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *15 March 2005*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-16* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-16* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Wong '357.

Wong '357 discloses a nut butter containing nut ingredients, seasonings, stabilizer, emulsifier and bulking agents at within the claimed amounts, with a particle size distribution of which 90% of the particles are less than 40 microns, and 50% of the particles are smaller than about 10 microns (abstract and col. 20, lines 18-25) as in claims 1 and 7. 1.4% of the particles are larger than 58.7 ("30 to about 42% of the water insoluble solids have a particle size of about 10.1 microns or greater (abstract)). The particular spreadability of 4.000 kg to 5.300 as in claims 1, 6, 7 and 12 is seen to have been inherent in the composition because the claimed particle sizes have been shown as would have been the viscosity of claims 2 and 8.

Claims 3 and 9 further requires nuts, a nut slurry or defatted nuts and claims 4 and 10, nut oil and claims 5 and 11, the use of peanut ingredients. Ground peanuts can be used as in claims 3 and 5, and 9 (col. 3, lines 50-61 (Wong '357).

Nut oil is found inherently in nuts as in claims 4 and 10.

Grinding once as in claim 14 is found in col. 5, lines 30-34.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1, 3, 4, 5, 9-11, 12, 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wong et al. '357 in view of Wong et al. '645.

Wong '357 discloses a nut butter containing nut ingredients, seasonings, stabilizer, emulsifier and bulking agents with a particle size distribution of which 90% of the particles are less than 40 microns, and 50% of the particles are smaller than about 10 microns (abstract and col. 20, lines 18-25). Claims 1 and 12 differ from the reference in the limitation that 1.4% of the particles are larger than 58.7 microns and in the particular spreadability of about 4.000 kg to about 5.3000 kg. Wong et al. '645 disclose that it is known that chunky type peanut better is made with larger peanut granules (col. 1, lines 54-55) and that nut spreadability is determined by the particle size of the nuts (col. 1, lines 65-70 and col. 2, lines 1-10). Therefore, it would have been obvious to vary the nut particle size in order to achieve a particular spreadibility as shown by Wong '645 in the process of Wong '357 and to add large size peanut granules to make chunky type peanut butter as shown by Wong '645 in the process of Wong '357.

Claims 3, 9 and 11 further requires nuts, a nut slurry or defatted nuts and claim 4, nut oil and claim 5, the use of peanut ingredients. Ground peanuts can be used as in

claims 3 and 5 (col. 3, lines 50-61 (Wong '357). Therefore, it would have been obvious to make a nut butter using the claimed ingredients as shown by the combined references.

Claims 4 and 10 further require nut oil in the composition. Wong '357 discloses the use of oil as in triglycerides (col. 6, lines 56-70). Also, nuts inherently contain a lot of oil. Therefore, it would have been obvious to substitute nut oil in place of triglycerides as they are both oils and it would have been obvious to use nut oil since nuts inherently contain oil.

The limitation as to grinding once is seen to be a process limitation in a composition claim, which is not given weight. Even so, grinding once as in claim 14 is found in col. 5, lines 30-34. Therefore, it would have been obvious to grind the nuts once.

Claims 2, 6, 7 and 8, 13, 15, 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wong '357 in view of Wong '645 as applied to claims 1, 3-5, 9-12, 14 above, and further in view of Meade.

Claims 2 and 8 require particular viscosities. Meade discloses a viscosity of 6,000 to 50 centipoise, which is the claimed lower range (col. 10, lines 26-30). Therefore, it would have been obvious to use a viscosity as disclose by Meade in the composition of Wong '357.

Claim 6 requires a particular spreadability. The particular spreadability has been shown because the particle sizes of nuts have been disclosed as above. Also, it would

have been within the skill of the ordinary worker to vary the particle size to achieve a particular nut size as it is known that the particle size affects the viscosity of the product, i. e. the spreadability. Column 5, lines 5-19 of Wong et al. '357 disclose various poise below 7,000 poise. No criticality is seen in the particular level of spreadability at this time absent a showing that 4 kg as claimed has a different spreadability than below 7000 cp or the 6,000 cp of Meade. Therefore, it would have been obvious to use known viscosities, which would have resulted in particular degrees of spreadability.

Claim 7 further requires that the composition is a reduced fat nut spread and that 10% of the particles are smaller than about 3 microns and claims 13 and 15 that 10% of the particles are smaller than 2 microns. Wong et al. '357 disclose a reduced fat spread (col. 18, lines 60-70, and col. 19, lines 1-9). Wong et al. '357 discloses that 30% of the particle sizes are less than 6.2 which encompasses 3 microns (abstract). Nothing unobvious is seen in using 10% of very small particles instead of 30% absent a showing of unexpected results. Also, Wong et al. '357 discloses that 91.5% of the particle sizes are 3.8 microns or greater, which means that 8.50% are smaller than 3.8 microns. Less than 3.8 microns also reads on smaller than "about 2 microns". It is seen that 3.8 microns reads on about 2 microns absent a showing of unexpected results using 10 % of the particles being 2 microns. Therefore, it would have been obvious to make a reduced fat spread as shown by the combined references. The further limitations of claim 12 have been discussed above and are obvious for those reasons.

The limitation as to grinding once is seen to be a process limitation in a composition claim, which is not given weight. Even so, grinding once as in claim 16 is

found in col. 5, lines 30-34. Therefore, it would have been obvious to grind the nuts once.

Response to Argument

Applicants arguments filed 3-17-05 have been fully considered but they are not persuasive. Applicants argue as to the rejection under 103 that the '357 reference discloses a monomodial particle size distribution and that the reference comprises from 50-100% of the nut paste having a particle size of less than about 21.6 microns. This amount distinctly reads on applicants claim 1 of 90% of the particles are smaller than about 40 microns. If applicants want to claim 21.6 microns, it is not seen why they do not do this instead of letting their more specific amount fall under Wong's '357 amount.

Applicants argue that the '645 reference adds nothing. However, this is not seen in that Wong et al. '645 disclose that it is known to make a chunky type peanut butter with larger peanut granules (col. 1, lines 54-55).

Applicants argue that that the dependent claims require specific viscosities, as in the 103 rejection adding Meade '737 and that Meade' 737 does not disclose the critical limitations. Mead '737 was used to show that the claimed viscosity was known in the lower range. As to critical limitations, nothing has been presented to show that the particular claimed particle sizes do not make a spreadability within the claimed range. The Patent Office does not have any way to determine such data. Applicants' specification discloses that the "spreadability characteristics result, in part form some or all of the physical characteristics, such as particle size distribution, relative amounts of fine and coarse sizes particles to medium size particles and oil release which are a

function of the gap mill process of the present invention" (page 14, para. 0051). As in the office action, the Wong reference '357 shows a particle size of 3.8 and no patentable distinction is seen in 3.8 microns and "about" 2 microns absent a showing of unobvious results.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 5-2-05

H. Pratt

HELEN PRATT
PRIMARY EXAMINER